be accorded more protection by the courts than articles in the class with oleomargarine. In view of this difference and in view of the restriction placed on the application of the doctrine of *McCray* v. *United States, supra,* the conclusion must be reached that the right of manufacturers to employ child labor is a right that cannot be restricted or destroyed by the Federal Government by the indirect method of taxation.

It being decided that neither the Federal nor the State Government can tax products of child labor, the question arises as to how this evil can be regulated or prohibited. It is within the police power of the State to pass any laws which may be necessary to protect the physical health, safety or morals of people in all classes of employment,[24] and this power has never been delegated to the Federal Government.[25] The Virginia legislation on the subject has culminated in the enactment of several acts which are now in force. In 1912 an act was approved by the General Assembly, entitled, "An ACT concerning coal mines and safety of employees * * *." [26] Section 15 of this act provides that no boy under fourteen years of age or female person of any age shall be permitted to work in coal mines. Again, in 1914, an act was passed, entitled, "An ACT to regulate the employment of children in factories, mercantile establishments, workshops and laundries, and as messengers, or selling or distributing newspapers or other periodicals in this Commonwealth * * *." [27] This act is an attempt to regulate all child labor and provides, among other things, that no child under ten years of age shall distribute newspapers; that no child under fourteen shall be employed in any factory, etc.; and that no male person under twenty-one or female of any age shall work in any place where liquor is sold, kept or manufactured, except an hotel. In 1918 this act was amended, thereby enlarging its scope and making it more drastic.[28] The constitutionality of these statutes has never been questioned.

TESTIMONY OF A WITNESS AS A PRIVILEGED COMMUNICATION.—It is commonly stated that there are two rules, the English and the American, governing the privilege of a witness in a judicial proceeding. The English rule provides that the statements of a witness in a judicial proceeding are absolutely privileged, and that no action for defamation lies for any words spoken on the witness stand. This rule has been modified by the American courts to the extent that the statements, in order to be privileged, must be relevant, thus making relevancy the test of the privilege. If relevant, the statements are absolutely privileged; even if irrelevant and

[24] See Muller *v.* Oregon, 208 U. S. 412.
[25] See U. S. *v.* Dewitt, 9 Wall. 41.
[26] Acts 1912, page 419.
[27] Acts 1914, page 671. See 1 VA. LAW REG. (N. S.) 634.
[28] Acts 1918, page 347.

false, but made in good faith, the general view is that the privilege is absolute.[1]

Notwithstanding the frequency with which these general statements of the law are found in the reports, it may well be doubted whether two such distinctive rules really exist. Courts are never more free in the use of *dicta* than in dealing with cases of this character, and loose and ill-considered statements find their way into the opinions. Although there are many *dicta* in the English reports which support the broad statement of the rule of absolute privilege, no case has been found which goes so far as to hold that each and every word spoken by a witness on the stand is privileged. On the other hand there are *dicta* which advocate some qualification of the rule, but in no case has a witness actually been held liable for his statements.[2] Lord Chief Justice Cockburn, in one of the cases most frequently cited, said: "For I am very far from desiring to be considered as laying down as law that what a witness states altogether out of the character and sphere of a witness, or what he may say dehors the matter in hand, is necessarily protected." [3] The cases usually cited to sustain this so-called rule of absolute privilege fall short of the rule in the immediate point of decision, but generally lay it down *obiter*.

The American decisions qualify the English rule by requiring relevancy for absolute privilege. In support of this position Chief Justice Shaw is frequently quoted: [4]

> "Then we take the rule to be well settled by the authorities, that words spoken in the course of judicial proceedings, though they are such as impute crime to another, and therefore if spoken elsewhere, would import malice and be actionable in themselves, are not actionable, if they are applicable and pertinent to the subject of inquiry. The question, therefore, in such cases is, not whether the words spoken are true, not whether they are actionable in themselves, but whether they are spoken in the course of judicial proceedings, and whether

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[1] Cooper *v.* Phipps, 24 Or. 357, 33 Pac. 985, 22 L. R. A. 836; Sebree *v.* Thompson, 126 Ky. 223, 103 S. W. 374, 15 Ann. Cas. 770, 11 L. R. A. (N. S.) 723; Kemper *v.* Fort, 219 Pa. 85, 67 Atl. 991, 123 Am. St. Rep. 623. Excellent annotations will be found appended to each of these cases in the selected series above cited.

[2] See note to Watson *v.* Jones, 4 B. R. C. 954, for a full collection of cases. See also 5 VA. LAW REG. 1, which contains an excellent discussion of the whole subject.

[3] Seaman *v.* Netherclift, L. R. 2 C. P. D. 53. Further on in the same case, Cockburn, C. J., said: "Or if a man when in the witness-box were to take advantage of his position to utter something having no reference to the cause or matter of inquiry in order to assail the character of another, as if he were asked: Were you at York on a certain day? and he were to answer: Yes, and A. B. picked my pocket there; it certainly might well be said in such a case that the statement was altogether dehors the character of witness, and not within the privilege." These statements of the law were indorsed by Justice Bramwell and further illustrations were given in his opinion.

[4] Hoar *v.* Wood, 3 Met. (Mass.) 193, 197.

> they are relevant and pertinent to the subject of inquiry. * * * Still, this privilege must be restrained by some limit; and we consider the limit to be this; that a party or counsel shall not avail himself of his situation, to gratify private malice by uttering slanderous expressions, either against a party, witness or third person, which have no relation to the cause or subject matter of the inquiry." [5]

The question then arises as to what is meant by "relevancy" and "having no relation to the cause or subject matter of the inquiry." The distinction between the English and the American decisions is to be found in the answer to this inquiry. The English courts are very liberal in construing the statements of a witness to be relevant to the proceedings. Where a witness, after his examination was finished and he was admonished by the presiding judge to be silent, grossly slandered a third party in order to defend a portion of his testimony which had been attacked, it was held that the statements were privileged.[6] In this country the very liberal construction of the English courts has been adopted in the States of Maryland,[7] Texas,[8] Kentucky[9] and perhaps Indiana,[10] Mississippi[11] and California.[12] The majority of American courts, while frequently holding that the construction of "relevant" should be liberal,[13] have so narrowed its meaning as to give rise to a wholly new line of decisions. Thus, in one case, a witness interested in having certain doctor's claims against an estate disallowed said: "I swear all these charges of Dr. C. except his ten visits to mother, are false and fraudulent. This isn't the first time he has made up an account either. He made up one against me of between forty and fifty dollars for which he hadn't made a visit, and I paid it and I can prove it." The court held that from the sentence, "This isn't, etc.," the words were not relevant, and that unless the defendant could show that they were spoken in good faith he was liable in damages to the plaintiff.[14] It is reasonably certain that the decision under the English rule would have been otherwise. The difficulty lies in the word "relevant," which is hardly the appropriate term. The words "having reference" or "made with reference to the inquiry" were suggested by Justice Bramwell.[15] The most that can

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[5] This statement of the law has been followed in Rice *v.* Coolidge, 121 Mass. 393, 23 Am. Rep. 279, and in McLaughlin *v.* Cowley, 127 Mass. 316.

[6] Seaman *v.* Netherclift, *supra.*

[7] Hunckel *v.* Voneiff, 69 Md. 179, 17 Atl. 1056, 9 Am. St. Rep. 413.

[8] Runge *v.* Franklin, 72 Tex. 585, 10 S. W. 721, 13 Am. St. Rep. 833.

[9] Sebree *v.* Thompson, *supra.*

[10] Hutchinson *v.* Lewis, 75 Ind. 55.

[11] Verner *v.* Verner, 64 Miss. 321, 1 South. 479.

[12] Ball *v.* Rawles, 93 Cal. 222, 28 Pac. 937, 27 Am. St. Rep. 174; Hollis *v.* Meux, 69 Cal. 625, 11 Pac. 248, 58 Am. Rep. 574. But see Wyatt *v.* Buell, 47 Cal. 624.

[13] Hoar *v.* Wood, *supra;* Calkins *v.* Sumner, 13 Wis. 193, 80 Am. Dec. 738.

[14] Clemmons *v.* Danforth, 67 Vt. 617, 32 Atl. 626, 48 Am. St. Rep. 836.

[15] Seaman *v.* Netherclift, *supra.*

be said is that the word has received two interpretations, one of which is preferred by the English and a few American courts, while the other is the generally accepted American view. Both interpretations, however, arise fom the same general principles of law.

The basis of any privilege is public policy. A wise public policy demands that a witness while on the stand should be allowed the greatest freedom in making his responses. As to statements which clearly have reference to the proceedings, there is no disagreement; no matter how slanderous or malicious, such statements are absolutely privileged.[16] This doctrine is necessary for the proper administration of justice. The disagreement arises from the frequent and perhaps unconscious tendency of witnesses to volunteer observations. The English view maintains that even these statements are privileged, not because the conduct of the witness is not censurable, but because it is necessary that a witness should be free to give his testimony in his own way without fear of any civil action being brought against him. The danger is that, if the rule were otherwise, *bona fide* witnesses would be subjected to the vexation of defending suits at law, even if they escaped hostile judgments.[17] According to this view the protection of the witness and the prosecution of justice are the cardinal considerations. The American view, while recognizing the force of these arguments, insists that the witness stand should not be used as a vehicle of slander. The test of relevancy, it is said, protects *bona fide* witnesses, and does not infringe the demands of public policy. A good name should be safe from slander, even if the slander emanates from a court of justice. It is this protection of one's name and fame which has led the American courts to qualify the English rule.[18]

By adopting the narrow interpretation of relevancy the American courts have been forced to qualify their own rule. Even if irrelevant and false, yet if the slanderous words are spoken in good faith the privilege attaches,[19] and good faith will be presumed.[20] Relevancy is held to be a matter for the decision of the court, while the jury is called upon to decide the question of good faith.[21]

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[16] Calkins *v.* Sumner, *supra;* Crockett *v.* McLanahan, 109 Tenn. 517, 72 S. W. 950; Cooley *v.* Galyon, 109 Tenn. 1, 70 S. W. 607, 97 Am. St. Rep. 823.

[17] Munster *v.* Lamb, L. R. 11 Q. B. D. 588; Hunckel *v.* Voneiff, *supra.* The kindred questions of the privilege of counsel and of pleadings were considered by the Maryland Court of Appeals at the same term as the case of Hunckel *v.* Voneiff. The opinions in all three cases are well considered on both authority and reason. It will be noted that the court reached the conclusion that the privilege of counsel was not as broad as the privilege of a witness. Maulsby *v.* Reifsnider, 69 Md. 143, 14 Atl. 505; Bartlett *v.* Christhilf, 69 Md. 219, 14 Atl. 518.

[18] Shadden *v.* McElwee, 86 Tenn. 146, 5 S. W. 602, 6 Am. St. Rep. 821; Sherwood *v.* Powell, 61 Minn. 479, 63 N. W. 1103, 52 Am. St. Rep. 614.

[19] Mower *v.* Watson, 11 Vt. 536; Lawson *v.* Hicks, 38 Ala. 279, 81 Am. Dec. 49.

[20] Mower *v.* Watson, *supra;* Cooper *v.* Phipps, *supra.*

[21] White *v.* Carroll, 42 N. Y. 161.

Even if irrelevant and malicious, as in every other case of defamation, truth is an absolute defense. It is submitted that the qualification imposed by the American view fritters away the privilege so as to make it almost valueless. A witness while on the stand must decide at his peril the relevancy of his remarks and stand a jury trial as to his good faith. The English view is simpler, more easily understood and applied, and is not fraught, as the American courts seem to think, with danger to the good name of the individual.

This interesting question has recently been decided by the Supreme Court of Ohio in the case of *Kintz* v. *Harriger* (Ohio), 124 N. E. 168. In this case the defendant gave evidence before a grand jury, from which evidence an indictment was found. The evidence was false and was known to be false when given. The accused was acquitted of the charge and later brought an action of malicious prosecution against the defendant. The court held that such false statements made before the grand jury were not privileged and that the defendant was liable in damages to the person so defamed. The court admitted that its position was *contra* to all precedent and based its decision on the ground of public policy, citing no authorities to sustain the view thus advanced. It is believed that the great weight of authority upholds the other view and protects these statements by making them absolutely privileged.[22] Under this better rule, therefore, such statements as were made in the instant case could not serve as a foundation for an action of malicious prosecution.

It seems that a case exactly in point has never come before the Virginia court so that the question remains undecided in that jurisdiction.[23]

FEDERAL JURISDICTION OVER AN INTERVENING PARTY WHEN THE ORIGINAL CAUSE IS WITHIN FEDERAL JURISDICTION ON THE GROUND OF DIVERSE CITIZENSHIP.—The framers of the Constitution of the United States, with their farseeing wisdom, provided for the creation of the Federal Courts.[1] And, not content with a bare creation, they went further and provided the grounds of jurisdiction.[2]

Among the provisions thus formulated, we find that the Federal Courts have jurisdiction of all questions arising between citizens of different States. The Constitution provides that "The Judicial Power shall extend to all cases * * * between citizens of different

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[22] See English and American authorities, *supra*. While the action in the instant case is in malicious prosecution, it seems that the question is the same as if it were brought in libel or slander. Especially does this seem true under the Ohio decisions. Lanning *v.* Christy, 30 Ohio St. 115, 27 Am. Rep. 431. For the Ohio doctrine see also Liles *v.* Gaster, 42 Ohio St. 631.

[23] Even *dicta* on the question are rare in Virginia. But see Dillard *v.* Collins, 25 Grat. 343, 352; Williams Printing Co. *v.* Saunders, 113 Va. 156, 176, 73 S. E. 472, 476.

[1] Constitution of the United States, Art. 111, § 1.

[2] Constitution of the United States, Art. 111, § 2.